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Understanding "Hostage-Diplomacy": The Release of Wei Jingsheng and Wang Dan

by Hari M. Osofsky

¶1 China recently has released two of its most prominent dissidents, Wei Jingsheng and Wang Dan, into exile in the United States. The releases corresponded to major United States-Chinese diplomatic initiatives without broader gains in allowing political dissent, causing a number of commentators to refer to them as "hostage-diplomacy."¹ This New Development explores what it means to think of the releases in this way and the implications for future strategic engagement with China.

I. HUMAN RIGHTS BARGAINING AS HOSTAGE-DIPLOMACY?

¶2 Calling the symbolic releases hostage-diplomacy analogizes them to negotiating with terrorists.² Such a comparison raises difficult issues. Although both uses of the term share the core notion of bargaining over human lives, the Chinese situation differs in a critical way—the people involved are Chinese citizens, not citizens of the state negotiating for their release.

¶3 When American hostages are held by terrorist organizations, ties of nationality give the United States authority to make decisions over their destiny. It can choose to risk citizens' lives as a matter of strategic principle—denying terrorists the power gained from negotiation³—because

1. See *Chinese Dissidents Give Wary Welcome to Release of Wang Dan*, AGENCE FRANCE PRESSE, Apr. 19, 1998 (using the term and describing the "thousands still behind bars").

2. The term is generally used in the context of terrorists with hostages. See, e.g., Clyde Haberman, *New Steps in Middle Eastern Hostage Diplomacy*, N.Y. TIMES, Sept. 13, 1991, at A8 (using term when describing negotiations to free Western hostages held in Lebanon); *Ending the Hostage Crisis in Peru* (ABC television broadcast, Apr. 22, 1997) (ABC Nightline) (using term in context of Peruvian hostage crisis). It has, however, been used in the context of political prisoners before, see *Policy Towards the United States "Matter of Concern"*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 6, 1995 (describing "North Korea's 'helicopter hostage diplomacy'"), and even to describe the release of Chinese dissidents. See Simon Long, *Tiananmen Anniversary Sowing Seeds of Economic Dissent*, THE GUARDIAN (London), June 4, 1994, at 15 (describing the release of Wang Juntao and Chen Ziming as part of the "hostage diplomacy that led up to the US renewal of Most Favoured Nation status").

3. The official U.S. policy has been to refuse to negotiate with terrorists. See A. L. Dewitt, *The Ultimate Exigent Circumstance*, 5 KAN. J.K. & PUB. POL'Y 169, 172 (1996); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1288 (1988); K. A. McNeely-Johnson, *United States v. Nixon, Twenty Years After: The Good, the Bad and the Ugly—an Exploration of Executive Privilege*, 14 N. ILL. U. L. REV.

the United States speaks for its people in the international arena. This obligation to protect their well-being and the standing to represent them is consistent with the traditional international relations conception of states as the primary subjects and objects of international law and of individuals as gaining legal personality through their citizenship.⁴

¶4 International concern over the treatment of Chinese prisoners, on the other hand, derives from notions of universal jurisdiction that undergird modern human rights law. Some actions, regardless of whether they occur within a state's sovereign jurisdiction, are so unacceptable that any State can intervene.⁵ Of particular relevance in relation to prisoners is the international ban on torture and other cruel, inhuman or degrading treatment or punishment. Both as a matter of treaty⁶ (one of the few human rights conventions to which China is a party)⁷ and customary international law,⁸ China is legally prohibited from allowing the official torture of its citizens. In the case of Wei Jingsheng and many others, China quite clearly committed or allowed unacceptable torture.⁹

¶5 The situation becomes trickier from a legal perspective, however, because the international concern focused on far more than China's unacceptable treatment of dissidents within prison. The underlying injustice committed against Wei Jingsheng and Wang Dan, as well as the many other political prisoners who continue to languish in prison, is imprisoning them because of their beliefs and expression of them.¹⁰ Although China has signed the International Covenant on Economic Social and Cultural Rights and has agreed to become party to the International Covenant on Civil and Political Rights, it is still in the process of domestic incorporation and thus is not yet fully bound by either of them.¹¹ China

251, 285 (1994). For a discussion of different approaches to dealing with terrorists, see Ayaz R. Shaikh, *A Theoretic Approach to Transnational Terrorism*, 80 GEO. L.J. 2131 (1992).

4. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58-70, 407-20 (4th ed. 1990); see also *Nottebohm Case* (Second Phase), ICJ Reports (1955).

5. See BROWNLIE, *supra* note 4, at 300-05; Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

6. See Convention Against Torture and Other Cruel Inhuman and Degrading Treatment, G.A. Res. 46, U.N. GAOR, 39th Sess., Annex, U.N. Doc. E/CN.4/1984/72, 23 I.L.M. 1027 (1984), revised by 24 I.L.M. (1985).

7. See Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: Signatories (visited July 26, 1998)

<http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html>.

China made reservations to article 20 (allowing the Committee Against Torture to investigate) and paragraph 1 of article 30 (providing for arbitration), thus limiting international intervention. See *id.*

8. Torture has been widely described as a *jus cogens* violation, not allowed by any state. See, e.g., *Siderman de Blake v. Argentina*, 965 F.2d 699, 716 (9th Cir. 1992) (describing torture as *jus cogens* violation); *Al Adsani v. Government of Kuwait*, High Court of Justice: Queen's Bench Division, appealed to Supreme Court of Judicature (1995) (still pending) (same).

9. See *China Frees Ailing Dissident to Have Treatment in US*, THE DAILY TELEGRAPH, Nov. 17, 1997, at 11 (describing Wei Jingsheng as having "endured almost two decades of torture and deprivation in Chinese gulags because of his demands for more democracy"); see also AMNESTY INT'L, CHINA: NO ONE IS SAFE 63-84 (1996).

10. See sources *supra* note 9; *China Warns Dissident Wang and Wei Are Still Criminals*, AGENCE FRANCE PRESS, Apr. 29, 1998.

11. See *China Arrests Another Prominent Democracy Advocate*, N.Y. TIMES, Apr. 4, 1998,

recognizes these rights in its Constitution, but that document also states that the Standing Committee interprets their meaning.¹²

¶6 The only basis then, as a matter of law, for intervening with China's imprisonment of its own citizens for their political beliefs would be if these expressive rights apply to China as part of customary international law. Not only is such a proposition debatable,¹³ but as a practical matter, international legal action against China on these grounds seems unlikely.

¶7 And this, of course, is where diplomacy comes into play. Countries attempt to achieve through the political process what the weak international legal system cannot support. Human rights become part of the bargain, in part, because other mechanisms cannot accord the same protection. When, for example, Nazi victim Hugo Princz could not obtain redress against Germany through the judicial process, the United States negotiated reparations for him.¹⁴

¶8 Objections to bargaining over Wei Jingsheng and Wang Dan's release thus should be read as implying a more nuanced concern than simply bargaining over human beings. Wei Jingsheng and Wang Dan became symbols for the human rights movement and Western governments of Chinese repression.¹⁵ Human rights advocates relied on concern over these individuals to bring attention to the larger problem of imprisonment of political dissidents. The movement focused on these courageous men, but always kept the larger problems in mind.

¶9 Chinese and American leaders, however, used these symbols as a publicly potent means of displaying progress on human rights without the more difficult work of fundamentally changing China's approach to political dissent. The problem with the releases—in and of themselves positive events—was not that the United States bargained for them, but that it lost sight of the larger issues in its bargaining. The focus was on the well-known figures rather than changing repressive practices more broadly. The releases did not represent a broader human rights victory because they occurred in the context of continuing repression of the exact sort used against these two heroes and of forcing them into exile.

at A3.

12. See XIANFA [Constitution], arts. 35, 67 (1982) (P.R.C.). "The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress." *Id.* art. 57.

13. For a discussion of whether freedom of expression is part of customary international law, see, for example, Paul H. Brietzke, *Insurgents in the "New" International Law*, 13 WIS. INT'L L.J. 1, 35 (1994) (claiming that "freedom of expression is widely recognized, but it is not a norm of customary international law"); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 348 (1995/96) (arguing that the widespread restrictions on freedom of expression established in article 19 of the declaration make it difficult to claim it is protected by customary international law without major restrictions).

14. See *Nazi Camp Survivors Face Deadline*, WASH. POST., Jan. 24, 1997, at A30.

15. Their frequent mention by the news media illustrates their symbolic significance. A search on Lexis reveals 3,613 news stories mentioning Wei Jingsheng in the past two years (News: Curnws search, May 17, 1998). Similarly, Wang Dan was mentioned 3,368 times in the past two years (News: Curnws search, May 27, 1998).

II. IMPLICATIONS FOR HUMAN RIGHTS STRATEGY

¶10 This "hostage-diplomacy" thus creates a dilemma for the human rights community. Focusing on individuals often is the only way to achieve legislative or diplomatic progress. The limited U.S. human rights exception to foreign sovereign immunity, for instance, came in response to the inability of victims of the Pan Am 103 bombing to gain redress.¹⁶ The plight of particular people arouses more compassion than abstract groups—and produces easier sound-bites for those focused on public image. A strategy of "opportunistic incrementalism" which seizes upon these instances may provide one of the few ways to create change.¹⁷

¶11 And yet the very potency of these human symbols allows them to be used not only by the victims and their advocates, but also by similarly opportunistic oppressors and politicians. The focused media attention upon the plight of Wei Jingsheng and Wang Dan allowed their release to represent human rights improvement. By sending these two leaders into exile, the Chinese also shifted attention away from its treatment of other political prisoners.

¶12 The symbol of the heroic dissident thus serves as a double-edged sword for those who wish to improve human rights, whether in China or anywhere else in the world. The critical issue, from a strategic perspective, is how to gain the attention and positive action without sacrificing the larger cause. While there are no easy answers, the experience of the releases of Wei Jingsheng and Wang Dan suggests some strategies—already followed by many in the human rights community.¹⁸

¶13 First, the human rights activists should not decouple the symbolic use of people from the larger issues. Although calls for the release of a particular individual are powerful—and good sound-bites—they always should be accompanied by discussion of the many others who are still imprisoned and the broader problems. Such an approach makes it harder for authoritarian leaders to subvert these human symbols.

¶14 Second, individuals do matter. Human rights at their core are not

16. See Harvey Berkman, *Lawyers Solve Lockerbie Case Glitch Just in Time*, NAT'L L.J., May 19, 1997, at A8.

17. The political resolution of the Hugo Princz case provides another example of legal change happening because of the plight of a particular individual. See *supra* note 14 and accompanying text. I also have suggested this approach in the context of foreign sovereign immunity. See Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35, 61-68 (1998).

18. See, e.g., AI Report 1998: China (visited July 26, 1998) <<http://www.amnesty.org/ailib/aireport/ar98/asa17.htm>> (describing the situation of many imprisoned for exercising political and expressive rights); Human Rights Watch/Asia (visited July 26, 1998) <http://www.hrw.org/hrw/worldreport/Asia.htm#P199_96123> (same); Lorien Holland, *China's Dissidents Urge Jiang to Releases More Prisoners After Wei*, AGENCE FRANCE PRESS, Nov. 17, 1997 (describing dissidents' calls for China to release more prisoners in addition to Wei Jingsheng); U.S./China: Clinton Will Talk Human Rights at the Summit, BULLETIN'S FRONTRUNNER, June 22, 1998 ("[Amnesty International] also urged Clinton to raise the issue of little-known prisoners whose fate has been obscured by the high-profile releases of dissidents Wei Jingsheng and Wang Dan.").

simply about the systemic change that preserves them, but as important, about ending the terrible suffering of particular people. Wei Jingsheng and Wang Dan are tremendous individuals who courageously have tried to lead China towards much needed democratization. The fact that they no longer languish in prison is a victory. The reality that they cannot be in their country to provide leadership is a tragedy. The human rights movement always will be about such individuals because they are the reason it exists in the first place.

¶15 Finally, Wei Jingsheng and Wang Dan, with their new-found freedom, can help lead those who care about human rights in China towards new specifics and symbols. They and the rest of the human rights community human rights community can and often do use their release as a step forward rather than allowing it to eclipse the plight of so many others.¹⁹ By naming more names and telling more stories, the pressure on Washington and Beijing can continue.

¶16 At some level, both human rights activists and political leaders engage in a form of "hostage-diplomacy." The real question is whether the diplomacy will empower the victims or the oppressors. Through critically examining the use of these "symbols" and then carefully crafting a strategy, this "hostage-diplomacy" can be a tool in freeing not only Wei Jingsheng and Wang Dan, but the many who are left behind.

19. See *supra* note 18.

